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In The

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,

v.

TODD ROKITA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT MARION COUNTY ELECTION BOARD

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QUESTION PRESENTED

When Indiana's Voter Identification Statute precludes some otherwise-qualified persons from voting and there is little or no evidence showing the in-person voter impersonation fraud the statute is designed to prevent, what standard should this Court apply in evaluating the constitutionality of the statute?

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Under Supreme Court Rule 24.2, the Marion County Election Board is satisfied with the presentation by the Petitioners in No. 07-21 of those portions of their brief required by Supreme Court Rule 24.1(b), (d), (e), and (f) and, therefore, the Marion County Election Board does not include those items in this brief.

In this brief, the Election Board takes no position on the constitutionality of the Voter Identification Statute.[1] Rather, the Election Board provides factual information about elections in Marion County, the most populous and most diverse county in Indiana, and presents its position regarding the standard of review this Court should use in evaluating the Voter Identification Statute.

STATEMENT

In 2005, the Indiana General Assembly enacted, and the Governor signed into law, a statute referred to in this brief as the Voter Identification Statute, Public Law No. 109-2005, codified in several sections of the Indiana Code including Sections 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1, and 3-11.7-5-2.5.[2] These provisions

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[1] Under Indiana law, an inferior political body such as the Election Board lacks authority to argue that a state statute is unconstitutional - and the Election Board makes no argument regarding constitutionality here. *Bd. of Comm'rs of Howard County v. Kokomo City Plan Comm'n*, 263 Ind. 282, 330 N.E.2d 92, 100 (1975).

[2] All citations to the Indiana Code have been verified using the version available on Westlaw as of November 30, 2007.

require an individual who is otherwise qualified to vote in Indiana to provide at the polls on election day a current form of government-issued identification, bearing a photograph and expiration date, in order to be allowed to vote.

The constitutionality of the statute is challenged in this litigation, which consolidates two separate lawsuits that were filed in the United States District Court for the Southern District of Indiana. The Marion County Election Board was a defendant in each of those cases. The parties challenging the statute's constitutionality have argued that it is difficult or impossible for some individuals to obtain identification meeting the statutory requirements, depriving those individuals of their right to vote.

The State of Indiana has defended the statute's constitutionality, arguing that the purpose of the statute is to protect against in-person voter impersonation fraud. The State also has challenged various plaintiffs' standing to bring the lawsuit. The Marion County Election Board briefed the issue of standing in the Court of Appeals, but that issue is being briefed by the State in this Court.

The district court ruled that some of the plaintiffs had standing and that the statute did not unconstitutionally burden the right to vote. Pet. App. at 96-117. The Seventh Circuit affirmed by a 2-1 vote, holding that at least the Indiana Democratic Party had standing and that the statute did not unconstitutionally burden the right to vote. Pet. App. at 4, 10. The Seventh Circuit denied rehearing *en*

banc, with four judges joining an opinion dissenting from denial of rehearing *en banc*. Pet. App. at 150-55.

The Marion County Election Board

The Marion County Election Board is established to conduct all elections and administer election laws in Marion County, Indiana. Ind. Code § 3-6-5-14(a)(2). The Election Board is bi-partisan in its construction, consisting of the elected County Clerk and two additional members, one nominated by each major political party. Ind. Code §§ 3-6-5-2, 3-6-5-5.

The Election Board's objective is to administer open, fair and fully-participatory elections without favoring any political party. The ideal result for the Election Board is an election with 100% voter participation. The ability of the Election Board to reach that ideal result suffers from any restriction unnecessarily reducing voter participation.

To foster voter participation and increase voter turnout, the Election Board seeks to increase the ease, openness, and accessibility of elections. A principal method to do so is by locating polling places conveniently to encourage neighborhood voting. Indiana law requires county executives to locate a polling place for a particular precinct within five miles from the closest boundary of the precinct, and each precinct can contain no more than 1,200 active voters at the time the precinct is established, with some exceptions. Ind. Code §§ 3-11-8-3(b); 3-11-1.5-3. Moreover, polling places are in locations accessible to persons with disabilities. Ind. Code § 3-11-8-6. By establishing most polling places in locations even more

convenient than the statutory minimum, Marion County has provided for neighborhood voting, a voting experience that is not crowded and that is close to a voter's home.

The Election Board additionally makes elections accessible by providing advance information about voting and polling places. Voters may obtain the location of their polling place on-line through the Election Board's website. Other information for voters is available on that website. The Election Board also strives to deliver friendly and helpful customer service to voters who telephone for election information.

The Election Board further supports its efforts to establish easy and open elections in its recruiting and training of poll workers. In Marion County, thousands of individuals volunteer to work at the polls at Marion County's 914 voting precincts each election day (the major political parties and the Election Board are unable to fill some of the 4,570 positions). The Election Board provides extensive training to these poll workers including hands-on training on setting up and operating the polls and voting machines. Election workers also are trained on counting absentee ballots (which are collected centrally and distributed to precincts for counting), counting in-person ballots, closing the polls, dealing with forms for voter name or address changes, and administering the requirements of the Voter Identification Statute.[3]

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[3] For example, the training PowerPoint for poll inspectors, which consists of more than 80 slides, may be found at http://www.indygov.org/NR/rdonlyres/DF7538EC-7424-4928-A965-

Accessibility is further enhanced by the operation of two sets of voting machines in each polling place. Most voters use an optical-scan machine that requires the voter to mark a paper "ballot card," which is machine-counted and retains a paper record. Primarily for voters with disabilities, each polling place also is equipped with at least one touchscreen machine, which allows any voter (including visually impaired voters, to whom the ballot is presented audibly on headphones) to vote unassisted in private.

To enhance convenience, the Election Board administers in-person voting at a central location in downtown Indianapolis for thirty days before election day, including some weekend days. Ind. Code § 3-11-10-26. Qualified voters may vote by absentee ballot by mail within ninety days of the election. Ind. Code § 3-11-4-3. The Election Board also administers traveling boards, which go to voters' homes upon voters' request to allow absentee balloting before election day. Ind. Code § 3-11-10-25.

CE6A72BBFF5E/0/inspectortraininggen07student.ppt (last visited Nov. 29, 2007). Other training materials are available at http://www.indygov.org/NR/rdonlyres/B60DF988-48DD-446E-B7AD-420FAB31E07E/0/2007PollInspectorAcademyTrainingMaterials.doc (last visited Nov. 29, 2007). The Election Board provides additional training materials for other poll workers, including clerks and judges.

Time-tested systems were in place to detect in-person voter impersonation fraud before the challenged statute was enacted

Before enactment of the statute challenged in this action, Indiana had in place several layers of protection against in-person voter impersonation fraud.

On election day, each precinct is administered by a precinct election board made up of an inspector and two judges, one from each major party; the law also calls for two clerks, one from each major party. Ind. Code §§ 3-6-6-1, 3-6-6-2. In many precincts, the precinct election board is made up of precinct residents, who often have worked at the polls for several years and know personally many of the voters of the precinct. This arrangement helps to protect against in-person voter impersonation fraud because precinct workers may recognize an imposter, and precinct election workers have the authority to challenge persons appearing to vote if the election board member "is not satisfied that a person who offers to vote is the person who the person represents the person to be." Ind. Code § 3-11-8-27.

Further, Indiana law allows each political party to appoint challengers, who may be inside polling places during elections. Ind. Code §§ 3-6-7-1, 3-6-7-5. A challenger may challenge any person appearing to vote whom the challenger believes is "not a legal voter in the precinct." Ind. Code § 3-11-8-21(3). These challenges could include situations in which the challenger believes the person is an imposter or is not qualified to vote by residence or for some other reason.

Some challenges may be resolved by the precinct election board or by an affidavit executed by the person appearing to vote, and those that cannot require the voter to vote by provisional ballot. *See* Ind. Code §§ 3-11-8-22.1, 3-11-8-23, 3-11-8-23.5.

Each precinct is provided with a poll book, which each person appearing to vote must sign. The poll book includes a photocopy of the registered voter's signature. *See* Ind. Code § 3-7-29-4. "In case of doubt concerning a voter's identity, the precinct election board shall compare the voter's signature with the signature on the affidavit of registration or any certified copy of the signature provided under Ind. Code § 3-7-29. If the board determines that the voter's signature is authentic, the voter may then vote." Ind. Code § 3-11-8-25.1(i). When the signatures do not match, the voter is subject to challenge.

This same signature verification process – comparing the voter's signature to a signature already on file – is the sole means to verify a mail-in absentee voter's identity under Indiana law. Ind. Code § 3-11-10-4. An absentee voter who votes by mail is not required to provide any additional identification. Ind. Code § 3-11-10-1.2.

Moreover, it is a felony for a person to vote – or even to present himself for voting – when a person is not registered or otherwise authorized to vote. Ind. Code § 3-14-2-9. More specifically, it is a felony to "vote[] or make[] application to vote in an election in a name other than the person's own." Ind. Code § 3-14-2-12(1). These crimes are punishable by incarceration

from six months to three years and a fine of up to $10,000. Ind. Code § 35-50-2-7.

Election accessibility under the Voter Identification Statute

As explained below, the Voter Identification Statute at issue in this case has precluded certain otherwise-qualified individuals from voting. Petitioners in No. 07-21 have identified certain otherwise-qualified individuals who are unable to obtain identification sufficient to satisfy the statute, and who therefore cannot vote. *Br. for Pets.* at 41. *Amici* have identified others who, although otherwise qualified, are or may be unable to vote as a result of the challenged Voter Identification Statute. *E.g., Br. of League of Women Voters of Ind.* (examples from Indiana); *Br. of Current and Former Secs. of State* at 12 (examples from other states).

Provisional ballots were not counted in the 2007 municipal election because of the Voter Identification Statute

In the 2007 municipal election, some votes of otherwise-eligible individuals were not counted because they did not comply with the Voter Identification Statute. The Election Board can verify that at least thirty-four persons arrived at the polls and presented themselves for voting without appropriate photo identification (others may have done so without making a record through the provisional balloting process). As required by statute, each of the thirty-four filled out and signed provisional ballot paperwork, then cast a provisional ballot that was not

counted, but rather was sealed and sent to the Election Board for further review. Of the thirty-four provisional ballots cast, only two voters followed up by bringing their compliant identification to the County Clerk's Office so that their provisional ballots would be counted. The other thirty-two did not bring compliant identification to the Clerk's Office within the time period designated by statute, and their votes therefore were not counted. *See* Ind. Code § 3-11.7-5-2.5.

All thirty-four individuals appeared at the polling place for the precinct in which they were registered. All signatures appearing on their provisional ballot envelopes matched the poll book signatures.[4] Two of those whose votes were not counted had voted in fifteen previous elections at their precincts. Six others had voted in fourteen elections at their precincts. Four others had voted in thirteen prior elections at their precincts. One had voted in twelve elections at her precinct, and another had voted in ten elections at her precinct. Only six had no history of voting in a Marion County election, and the remaining persons had voted a handful of times at the precinct where they were registered and appeared on November 6, 2007.

No evidence of in-person voter impersonation fraud

The Election Board views the Voter Identification Statute in the context of its experience administering elections in Indiana's most diverse and most populous

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[4] One provisional ballot envelope was unsigned by the individual seeking to vote.

county. The Marion County Election Board has neither any memory nor any record of any instance of the in-person voter impersonation fraud the Voter Identification Statute is designed to combat.

SUMMARY OF ARGUMENT

Before enactment of the Voter Identification Law, multiple protections were in place to prevent in-person voter impersonation fraud, and they remain today. These include local election boards, voter challenge processes, poll books allowing comparison of a voter's prior signature with the signature of the person presenting himself to vote, and criminal laws making voter impersonation a felony.

As shown in this brief and the briefs of Petitioners and *amici*, the Voter Identification Statute not only has precluded some individuals from voting (as the Seventh Circuit concluded), it also undermines the accessibility of the election process by promoting the idea that voting is difficult. Some persons who sought to vote in the 2007 municipal election did not have their votes counted because they did not have proper identification, including fourteen individuals who had previously voted in-person ten or more times at the same polling places where they were not permitted to vote in 2007.

The Marion County Election Board has no record and no knowledge that the in-person voter impersonation fraud the Voter Identification Statute is designed to address has previously occurred in Marion County.

The magnitude of the interest affected by the Voter Identification Statute and the lack of evidence of the problem it is designed to prevent dictate that this Court should examine the law with close scrutiny.

ARGUMENT

Because the right to vote is vitally important and the evidence of in-person voter impersonation fraud is sparse, the Court should closely scrutinize the statute.

The test under which the constitutionality of Indiana's Voter Identification Statute should be analyzed appears in *Burdick v. Takushi*:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

504 U.S. 428, 434 (1992), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

In this case, the injury is the denial of the right to vote to individuals who, for whatever reason, are unable to obtain qualifying photographic identification as required by Indiana statute. The right of suffrage

is very justly regarded as a fundamental article of republican government. *The Federalist* No. 52, at 354 (James Madison) (Jacob E. Cooke, ed., 1961). This Court has noted that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Thus, the character of the alleged injury is of the highest importance, although the magnitude of its denial has not yet been fully quantified.

The Court of Appeals wrongly diminished this interest, stating that "[t]he benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote) . . . ."[5] Pet. App. 3 (emphasis in original). This view overlooks the value of voting to the individual voter, who participates in selecting those who represent the voter, and to society as a whole, because citizens' trust in government rests in part on their participation in its processes. As Judge Wood wrote (on behalf of three other judges) in her dissent from denial of rehearing en banc, "as a

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[5] Some elections are decided by one vote. This item appeared in the *Richmond (Ind.) Palladium-Item* on November 10, 2007: "WINCHESTER, Ind. – Bill Monroe lost by one vote in his bid to return to the Winchester City Council. And here's the clincher to the squeaker of a race: His wife didn't vote. If Kathie Monroe had indeed voted Tuesday, her husband, a Democrat who previously served two terms on the council, would have tied with Republican opponent Tom Sells, a political newcomer." http://www.pal-item.com/apps/pbcs.dll/article?AID=/20071110/NEWS01/711100314/1008 (last visited Nov. 29, 2007).

matter of law the Supreme Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters." Pet. App. 154.

While each individual's right to vote is fundamental, *see Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the Voter Identification Statute also undermines the overall atmosphere of open, accessible elections that the Marion County Election Board and Indiana law otherwise try to promote. The Voter Identification Statute, and the publicity surrounding it, encourage the notion that voting is difficult. That idea in itself is likely to depress voter turnout.

When voting rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). In contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434, quoting *Anderson*, 460 U.S. at 788. "[A]s a general matter, 'before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (parentheses in original).

Because Indiana's Voter Identification Law has deprived some otherwise-qualified persons from exercising their right to vote (as the Seventh Circuit majority concluded), and because there has been no

showing of in-person voter impersonation fraud (as the State concedes), this Court should apply close scrutiny to the statute.

CONCLUSION

The Court should apply close scrutiny in its evaluation of Indiana's Voter Identification Statute.

Respectfully submitted,

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